

EX PARTE OR LATE FILED



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February 2, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
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Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

Re: Ex Parte CC Docket No. 94-1
Price Cap Performance Review for Local Exchange Carriers

Dear Mr. Caton:

On Thursday, February 2, 1995, I met with Mr. James L. Casserly, Senior Legal Advisor to Commissioner Susan Ness, to discuss AT&T's position in the above mentioned docket. The attachments were discussed in addition to discussing items previously entered in the record.

In accordance with Section 1.1206(a)(1) of the Commission's Rules, two (2) copies of this Notice are being submitted to the Secretary of the FCC on the date of the meeting.

Sincerely,

Bruce K. Cox

Attachments

cc: Mr. James L. Casserly

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**THE FACTS ON
LONG DISTANCE CUSTOMER BENEFITS FROM
ACCESS REDUCTIONS**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

**BECAUSE THE LONG DISTANCE MARKET IS COMPETITIVE,
ACCESS COST REDUCTIONS TO LONG DISTANCE
COMPANIES ARE PASSED ALONG TO CONSUMERS.**

UNDER PRICE CAP REGULATION,

***AT&T IS REQUIRED BY FCC RULE 47CFR61.44(b) TO
FLOW THROUGH ACCESS REDUCTIONS TO
CUSTOMERS OF ITS PRICE CAP REGULATED SERVICES.**

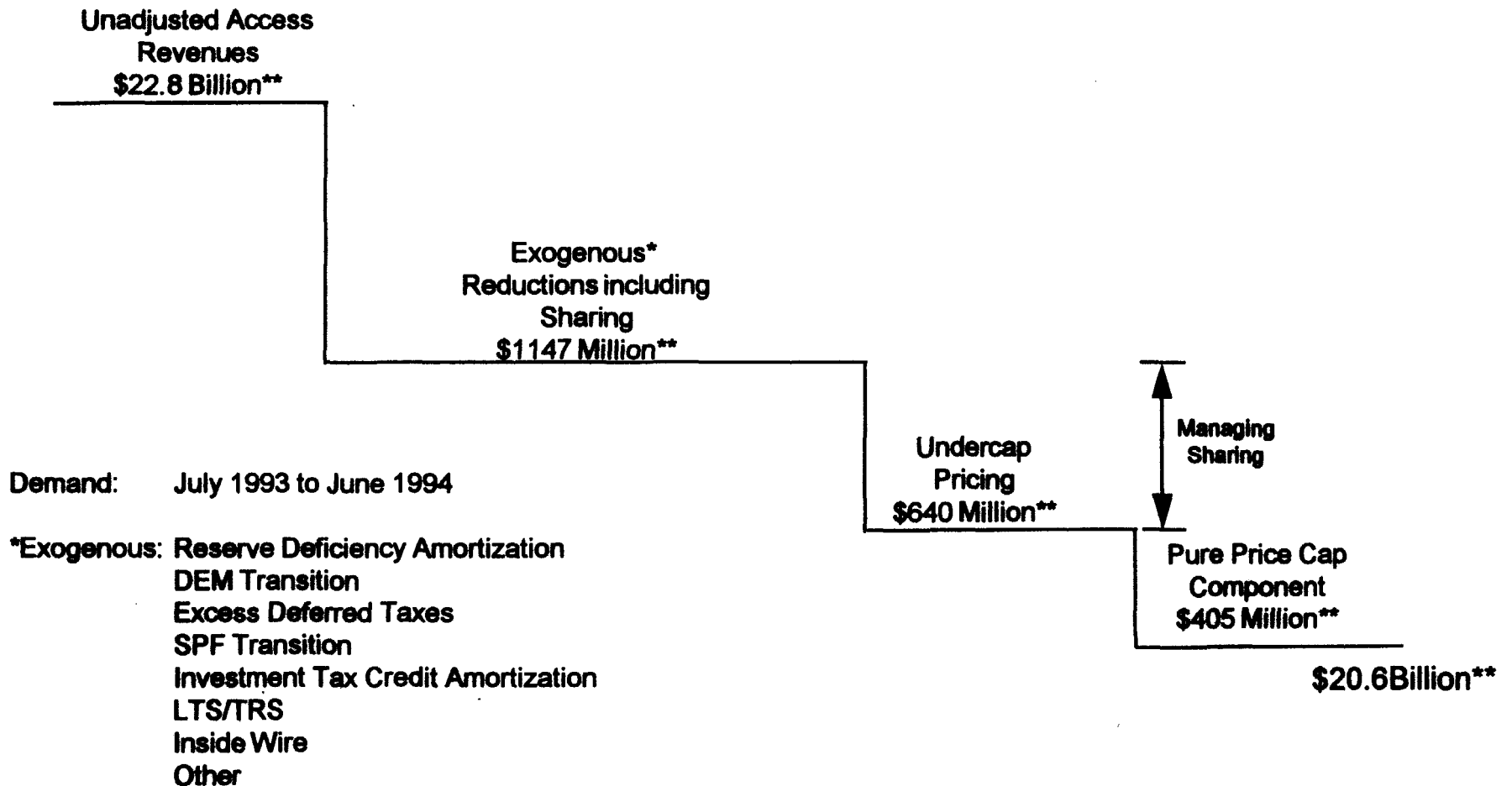
***AT&T'S ACCESS FLOW THROUGH IS REVIEWED WITH
THE FCC'S TARIFF DIVISION FOR APPROVAL.**

**FCC rule 47CFR61.44(b) states:
Subject to paragraph (d) of this section, adjustments to each PCI of
dominant interexchange carriers shall be made pursuant to the following
formula:**

**$PCI_t = PCI_{t-1} * [1 + w * (GNP - PI - X) + *Y/R + *Z/R]$
where**

***Y = (new access rate minus access rate at the time the PCI
was updated to PCI_{t-1}) times (base period demand)**

Interstate Access Rates Have Declined Under Price Caps Mainly Because Of Exogenous Cost Reductions and Managing Sharing, Not Incentives Of The Plan



** Per USTA 11/29/94 Ex Parte

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

MFS Intelenet of Illinois, Inc. :	:
-vs-	:
	94-0422
Illinois Bell Telephone Company :	:
Complaint and petition as to :	:
alleged refusal to provide :	:
certain intercarrier :	:
arrangements. :	:

REPLY OF THE STAFF OF THE ILLINOIS
COMMERCE COMMISSION TO BRIEF ON EXCEPTIONS
TO THE HEARING EXAMINER'S PROPOSED ORDER

The Staff of the Illinois Commerce Commission, by its attorney, hereby responds to Illinois Bell Telephone Company's Brief on Exceptions to the Hearing Examiner's Proposed Order.¹

1. Illinois Bell Telephone Company (IBT or Illinois Bell), by its refusal to provide MFS Intelenet of Illinois, Inc. (MFS) intercarrier arrangements and enter into a mutual compensation arrangement with MFS, and by its brief on exceptions to the Hearing Examiner's Proposed Order (Proposed Order), has displayed its true response to competition -- fight it every inch of the way until ordered to permit it. This in spite of repeated pronouncements publicly and in the press that it welcomes competition. Its actions before this Commission repeatedly contradict its rhetoric, and it is important for the Commission in this case to finally put an end to Ameritech's posturing. It is time that the Proposed

¹Illinois Bell Telephone Company is the only party filing a brief on exceptions to the Hearing Examiner's Proposed Order.

Order in this case be adopted by the Commission so that competition can begin. No one is fooled by Ameritech's insincere welcoming of competition as can be seen in Staff's Reply Brief in Ameritech's Customers First proceedings:

In effect, failing this [imputation] test indicates that using IBT's switched access rates for mutual compensation amongst competitors will result in the absence of those competitors. Simply put, if the Commission adopts IBT's position that its current switched access rates should be used as rates of mutual compensation, local exchange competition will not exist on any truly measurable scale. In Staff's opinion, this result cannot be severed from IBT's stated intention that its Customers First proposal will facilitate competition. In Staff's opinion, because mutual compensation is most likely the most critical element of local exchange competition (ICC Staff Ex. 2.01 at 32), the Commission must decide whether its goal in these proceedings is indeed the facilitation of local exchange competition or, in contrast, to allow IBT to espouse the idea while actually precluding competition by utilizing its switched access rates for mutual compensation. Staff recommends that the Commission deny IBT's mutual compensation proposal.

Reply Brief of the Staff of the Illinois Commerce Commission, Dockets 94-0048 and 94-0049 and Dockets 94-0096, 94-0117, 94-0301 and 94-0146, Consolidated.

In addition, on December 7, 1994, the U.S. Department of Justice (DOJ) forwarded to Staff a copy of a proposed order drafted by Ameritech to be submitted by DOJ and Ameritech to the U.S. District Court in order for Ameritech to obtain a waiver of the interLATA ban contained in the Modified Final Judgement (MFJ).² Although distributed by DOJ for discussion purposes, the trans-

²U.S. v. Western Electric Co., 552 F.Supp. 131 (D.D.C. 1982). On December 23, 1994, the Staff filed a motion to reopen the record in the Customer First consolidated dockets for the limited purpose of admitting the draft proposed order into the record in those proceedings. A copy of the order is attached to Staff's motion.

mittal letter from DOJ did indicate, the order was drafted by Ameritech. What is instructive is paragraph 6 of the proposed order:

6. ORDERED FURTHER, that Ameritech may not commence to provide interexchange services under this temporary waiver until after Ameritech shall have reported to the Department and certified to the Court that: (1) legal and regulatory barriers to local competition have been removed and (2) actual and substantial potential competitive alternatives for exchange and exchange access services have become reasonably available in the Temporary Waiver Territory for Ameritech's customers. In making its report and certification, Ameritech must state that within the Temporary Waiver Territory: (1) at least one alternative provider has been granted local exchange authority and is actually offering local exchange services; . . . (5) Ameritech has implemented appropriate arrangements for interconnection, including reciprocal compensation, access to databases and signalling resources; and

Staff believes that it is important to point out that by following the Hearing Examiner's Proposed Order in this docket, Ameritech would go a long way toward offering "appropriate arrangements for interconnection, including reciprocal compensation, access to databases and signalling resources" and hence, being in compliance with its own draft order. However, it is equally important to note that if the Proposed Order is not entered by the Commission, Ameritech will be allowed, in Illinois, to continue its control over the interconnection of competing companies. This will allow Ameritech to manage competition until it is willing to "give up" control in order to "get" interLATA relief from the DOJ and the Court. This is not a "bargaining chip" which Staff believes should be left to Ameritech, either for legal or public policy reasons.

2. Illinois Bell argues that unreasonable discrimination is a question of fact, not a question of law, citing a number of cases. A review of the cases shows that this principle of law applies to unreasonable discrimination as to rates. The issue in this proceeding is not whether the rates charged by Illinois Bell to MFS are unreasonably discriminatory. The issue is whether Illinois Bell is unreasonably discriminating against MFS based on Section 13-505.2 of the Public Utilities Act (Act), 220 ILCS 5/1-101 et seq. (1993), by refusing to interconnect to MFS like it interconnects to other telecommunications carriers, e.g., Centel and GTE, not just the reasonableness of the rates.

Assuming a determination of unreasonable discrimination under Section 13-505.2 of the Act is a question of fact, the facts are in the record. It is a fact that Illinois Bell has refused to provide MFS intercarrier arrangements and enter into a mutual compensation with MFS. Illinois Bell has attempted to justify this refusal for a number of reasons. The reasons given are not compelling.

3. IBT argues that MFS has the burden of showing unreasonable discrimination. IBT BOE at 7. MFS has met its burden. MFS is a telecommunications carrier with a certificate to provide local exchange service under Section 13-405 of the Act. Illinois Bell is a telecommunications carrier providing both noncompetitive and competitive services. Terminating access and interconnection are noncompetitive services. IBT has refused to provide these services to MFS under the same rates terms and conditions that it provides

to other telecommunications carriers providing local exchange service.

4. Illinois Bell argues that the payment of money to independent telephone companies (ICo) is not a service. Illinois Bell focuses on traffic originated by it and terminated by the ICos. Illinois Bell also terminates traffic for the ICos, and the ICos compensate Illinois Bell for terminating traffic. This is a service. Illinois Bell also provides interconnection local exchange carriers under a different arrangement than it has offered MFS. Interconnection is also a service.

5. Illinois Bell has raised an issue that has some merit but is not controlling. Illinois Bell argues that MFS has failed to file "carrier access tariffs which would allow it to collect compensation from IBT for terminating traffic." IBT BOE at 9. Illinois Bell and the ICos do compensate one another based on their carrier access tariffs. MFS cannot demand payment for terminating Illinois Bell's traffic if it does not have tariffs on file. However, once MFS files tariffs and they become effective, Illinois Bell will be required to pay MFS for services covered by the tariff at the rates set forth in the tariff. The issue Illinois Bell raises is similar to the question of which came first, the "chicken or egg." Which must come first, MFS filing tariffs or Illinois Bell entering into intercarrier and mutual compensation arrangements, is not determinative. However, MFS will have to file carrier access tariff if it wishes to terminate other carriers'

traffic.³ MFS can file the tariff any time prior to providing the service. In addition, this issue can be accommodated within the context of the Proposed Order. The Proposed Order suggests that Ameritech will compensate MFS through MFS's participation in the Primary Toll Carrier Plan. The Primary Toll Carrier Plan provides that carriers compensate one another based upon their access tariffs filed with the Commission. The Commission could adopt the Proposed Order and then MFS could file tariffs for compensation at its leisure. MFS could utilize the Order to obtain physical interconnection and could even exchange traffic with Ameritech. Only when MFS wanted to charge Ameritech for terminating traffic would it then be required to file tariffs. All of this can be accomplished without any changes to the Proposed Order.

6. Illinois Bell argues that a certificate granted pursuant to Section 13-405 of the Act does not grant MFS a right to intercarrier arrangements. Staff disagreed with Illinois Bell previously on this point.⁴

What Illinois Bell fails to comprehend is that Section 13-505.2 prohibits Illinois Bell from treating MFS unreasonably vis-à-vis the other local exchange carriers (LECs). In other words, while the specific language of the Act does not explicitly require Ameritech to provide MFS any specific arrangements, MFS's acqui-

³This will remain Staff's position even if the Hearing Examiner's Proposed Order is entered by the Commission.

⁴See Response of the Staff of the Illinois Commerce Commission to Illinois Bell Telephone Company's Motion to Hold in Abeyance at paras. 6-7.

tion of a 13-405 certificate similarly situates MFS as a local exchange provider, like Centel, GTE, and many others. This fact in combination with Section 13-505.2 of the Act requires that Ameritech provide to MFS the same services and arrangements at the same prices that it offers them to other local exchange carriers. If Ameritech were not offering services to other similarly situated companies, a strong argument could be made that Section 13-405 alone would not require Ameritech to offer services to MFS. This, however, is not the case. Ameritech does provide a great number of services and is involved in many arrangements with other local exchange carriers. It is Ameritech's refusal to include MFS within these arrangements that is unduly discriminatory.

7. Staff finds intriguing the arguments of Illinois Bell that the Commission lacks authority to grant the interim relief sought by MFS. However, the argument lacks merit.

Essentially, Illinois Bell argues that the "Proposed Order plainly constitutes a temporary mandatory injunction . . ." and "the plain language of the Act establishes that no such power exists, since nowhere in the Act is the Commission given the authority to grant such a remedy." IBT BOE at 11. Since the Commission's power is limited to that conferred by statute, it has no power to issue a temporary mandatory injunction. Id. The remaining arguments by Illinois Bell focus on why the Proposed Order does not meet the prerequisites for issuing a temporary mandatory injunction.

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The problem with Illinois Bell's analysis is simple: calling the Proposed Order a temporary mandatory injunction does not make it one.

The Commission has general supervisory authority of Illinois Bell under Section 4-101 of the Act. Section 4-201 requires the Commission to ensure the laws of this State affecting public utilities are enforced and obeyed. Section 5-101 requires utilities to "do everything necessary to secure compliance with and observance of this [the] Act" Section 8-502 and 8-506 authorize the Commission to order joint use or interconnection of two public utilities' facilities.

Lastly, two hearings have been held in this proceeding — one on October 28, 1994, and one on November 17, 1994. The notice from the Chief Clerk dated October 18, 1994, stated:

Notice is also given that at the hearing Illinois Bell Telephone Company should be prepared to respond to MFS Intelenet of Illinois, Inc.'s request to have the Illinois Commerce Commission immediately direct Illinois Bell to enter into inter-carrier arrangements.

Illinois Bell was granted an opportunity at a hearing to respond and present evidence on the question why an order should not be entered by the Commission that immediately directs Illinois Bell to enter into intercarrier arrangements. It did not avail itself of that opportunity to do so, but instead filed a Motion to Hold in Abeyance, which motion was subsequently denied. Illinois Bell cannot now claim there was no hearing because it chose to try a different procedural maneuver (attempt to delay the proceeding) than using the opportunity it had to put on evidence.

Section 10-101 of the Act requires compliance with the Illinois Administrative Procedure Act (IAPA), 5 ILCS 100/1-1 et seq. (1993), including Sections 10-25 and 10-35 of the IAPA. Section 10-25 of the IAPA requires the opportunity for a hearing after reasonable notice and "an opportunity shall be afforded all parties to be represented by counsel and to respond and present evidence and argument." The notice referred to above was dated October 18, 1994. The hearing was held October 28, 1994. The notice specifically identified Illinois Bell's right to respond; in fact, it told the Company to be prepared to do so. Illinois Bell was represented by counsel. It had a notice of the hearing and had the opportunity to respond by presenting evidence and argument. It elected not to do so; that was its choice. But the requirements under the Act and the IAPA for a hearing have been met.

Section 10-103 of the Act states:

In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding, including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative Procedure Act. [5 ILCS 100/10-35].

Section 10-35 of the IAPA and Section 200.700 of the Rules of Practice, 83 Ill. Adm. Code 200, define the record in a proceeding. There is no question that the Proposed Order is based on the record in this proceeding.

Contrary to assertions by Illinois Bell, the Proposed Order complies with the Act, the IAPA, and the Commission's Rules of Practice.

8. IBT argues that assuming the Commission does have authority to enter the Proposed Order, as a matter of sound regulatory policy, it should not do so. IBT BOE at 15-16. Staff takes strong exception to Illinois Bell's position. To the contrary, sound regulatory policy requires that the Commission enter the Proposed Order.

MFS has a certificate to provide local exchange service. The Act contemplates multiple local exchange providers. The only thing preventing the legislative intent of the General Assembly from being carried out is Illinois Bell. It has placed itself in the position of deciding whether MFS can exercise its certificate by refusing intercarrier and mutual compensation arrangements.

Nothing in the affidavit of J. Thomas O'Brien indicates that the two parties cannot solve any "problems" which may need to be addressed. IBT BOE at Ex. B. Illinois Bell would lead one to believe that every specific detail, both of a technical and policy nature, must be resolved by this Commission prior to MFS being granted its relief. In the interconnection rulemaking, Docket 92-0398, Mr. O'Brien took the position that the interconnection rule should only specify minimal standards for collocation. IBT Ex. 1.2 at 8-9. Mr. O'Brien referred to the "Stipulation between Illinois Bell and Teleport that was approved in the Third Interim Order in Docket 90-0425. That Stipulation specified that:

Illinois Bell should provide such unbundled interconnection in a manner which is economically, technologically and administratively comparable to the manner in which Illinois Bell's facilities interconnect with its own networks. . . ."

Id. Mr. O'Brien did not seem to see a problem with minimal guidelines in Docket 92-0398. In fact, the finding in the Proposed Order is very similar in design:

- (7) Respondent is therefore directed to offer Complainant inter-carrier arrangements, including reciprocal compensation for the exchange of local traffic and interconnection arrangements which are similar to those offered to I-Co's contiguous with IBT; these arrangements will be offered on an interim basis pending the conclusion of a number of other dockets, including 94-0096, 94-0049, 94-0048 and 94-0146; if necessary, these interim arrangements can then be modified to mirror the Commission's conclusions in those dockets;

The Proposed Order is specific enough for Illinois Bell to know what is required of it. Staff does not see what is so radical about requiring Illinois Bell to treat a telecommunications carrier with a certificate to provide local exchange telecommunications service the same as any other local exchange carrier on an interim basis if this is what MFS wants.

9. Staff believes the first ordering paragraph on page 10 of the Proposed Order should refer to Finding (7).

10. In the last ordering paragraph, the phrase "Administrative Law" should read "Administrative Review Law."

11. The Act, the Commission's previous orders and pronouncements, and Illinois Bell's own pronouncements on competition support the Commission entering the Proposed Order.

NOW THEREFORE, the Staff respectfully requests that the exceptions of Illinois Bell to the Hearing Examiner's Proposed Order be denied.

Respectfully submitted,



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Staff Attorney

Counsel for the Staff of the
Illinois Commerce Commission

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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

MFS Intelanet of Illinois, Inc. :

-vs- :

94-0422

Illinois Bell Telephone Company :

Complaint and petition as to :
alleged refusal to provide :
certain inter-carrier :
arrangements. :

NOTICE OF FILING

To: Attached Service List

PLEASE TAKE NOTICE that we have on this 6th day of January, 1995, filed with the Chief Clerk of the Illinois Commerce Commission, the Reply of the Staff of the Illinois Commerce Commission to Brief on Exceptions to the Hearing Examiner's Proposed Order, copies of which are hereby served upon you.



RICHARD S. WOLTERS
Staff Attorney

Counsel for the Staff of the
Illinois Commerce Commission

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Filing, together with the Reply of the Staff of the Illinois Commerce Commission to Brief on Exceptions to the Hearing Examiner's Proposed Order, were mailed to the actual parties on the attached service list by first class mail, proper postage prepaid, on the 6th day of January, 1995.


RICHARD S. WOLTERS

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